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PP v. NG WING FAU & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
ZAKARIA SAM JCA
AB KARIM AB JALIL JCA
B [CRIMINAL APPEAL NO: J-05-131-03-2017]
26 FEBRUARY 2018

C ***CRIMINAL PROCEDURE:*** *Appeal – Motion for reinstatement – Application to relist appeals which were earlier struck off – Preliminary objection – Whether Public Prosecutor had no right of appeal from order of High Court – Whether order of High Court dismissing application to relist appeals an interlocutory decision – Whether dismissal of notice of motion possessed element of finality – Whether decision appealable – Whether preliminary objection dismissed*

D ***CRIMINAL PROCEDURE:*** *Appeal – Motion for reinstatement – Application to relist appeals which were earlier struck off – Whether appeals struck off merely by reason of non-appearance of respondent without consideration of entire evidence – Whether court functus officio – Criminal Procedure Code, s. 278*

E The first and fifth respondents were charged separately before the Magistrate's Court for an offence under s. 135(1)(g) of the Customs Act 1967 and a second alternative charge under s. 138 of the same Act, both punishable under s. 135(1)(iii)(aa) of the same Act. The first and fifth respondents claimed trial to the charges. The respondents were acquitted and discharged by the Magistrates court without their defence being called on the ground that
F the prosecution failed to establish a *prima facie* case against them. The Public Prosecutor ('PP') appealed to the High Court. The High Court, ordered the respondents to enter their defence and remitted the case back to the Magistrate's Court for continued hearing. The Magistrate held that the respondents had succeeded in raising a reasonable doubt in the prosecution's case and acquitted and discharged the respondents. Aggrieved by the said
G decision, PP once again appealed to the High Court *ie* Appeals No 41LB-03-02-2015 and No 41(ORS)-01-02-2015. The appeals were, however, postponed several times as the respondents were absent. Due to this, on 8 September 2016, the High Court Judge ordered both the appeals to be struck out. The PP filed a notice of motion for reinstatement of the appeals
H and for a stay of execution of the decision of the Magistrate. The PP applied to the High Court for the following reliefs, *inter alia* (i) to relist the said appeals which were struck off earlier on 8 September 2016; and (ii) to grant an extension of time for the PP to file an appeal against the decision dated 8 September 2016 to the Court of Appeal. On 19 February 2017, the High
I Court dismissed the notice of motion. Aggrieved, the PP appealed to this

court. At the outset of the hearing, the respondents raised a preliminary objection stating that the present appeal could not be entertained on the ground that the PP had no right of appeal from the order of the High Court.

Held (allowing appeal)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) In order to determine whether a decision is final, it is important to bear in mind that it is not merely the result of the decision that ought to be considered but also predominantly its effect. The order of the High Court dismissing the PP's application to relist the said appeals which were struck out earlier by another judge was not an interlocutory decision. This was at the appellate stage after the Magistrate had acquitted and discharged the respondents. The very nature of the dismissal of the notice of motion possessed an element of finality. Upon dismissing the notice of motion, the PP's appeal would become infructuous and the order of acquittal and discharge made by the Magistrate must therefore be regarded as final. Therefore, the decision dated 19 February 2017 was appealable to the Court of Appeal. The respondents' preliminary objection was thus dismissed. (paras 12 & 14)

(2) The expression 'judgment' must necessarily mean a considered order on merits and not an order of dismissal for default. Therefore, *functus officio* under s. 278 of the Criminal Procedure Code did not arise as the appeals were struck out merely by reason of the non-appearance of the first respondent without consideration of the entire evidence. The High Court was competent to set aside such order by invoking its inherent jurisdiction; and thereafter to relist the appeals and to hear and decide the appeals according to the law. Thus, the said appeals were to be remitted back to the High Court and be heard on its merits before another High Court Judge. (paras 19 & 21)

***Bahasa Malaysia** Headnotes*

Responden pertama dan kelima dituduh secara berasingan di Mahkamah Majistret untuk kesalahan bawah s. 135(1)(g) Akta Kastam 1967 dan satu pertuduhan alternatif kedua bawah s. 138 Akta yang sama, kedua-duanya boleh dihukum bawah s. 135(1)(iii)(aa) Akta yang sama. Responden pertama dan kelima memohon untuk dibicarakan. Responden-responden dilepaskan dan dibebaskan oleh Mahkamah Majistret tanpa dipanggil membela diri atas alasan pihak pendakwaan gagal membuktikan satu kes *prima facie* terhadap mereka. Pendakwa Raya ('PR') merayu ke Mahkamah Tinggi. Mahkamah Tinggi memerintahkan responden-responden membela diri dan meremitkan kes kepada Mahkamah Majistret untuk perbicaraan selanjutnya. Majistret memutuskan responden-responden berjaya membangkitkan keraguan munasabah dalam kes pendakwaan dan melepaskan dan membebaskan

responden-responden. Terkilan dengan keputusan tersebut, PR sekali lagi merayu ke Mahkamah Tinggi iaitu Rayuan-Rayuan No 41LB-03-02-2015 dan No 41(ORS)-01-02-2015. Rayuan-rayuan itu, walau bagaimanapun, ditangguhkan beberapa kali akibat ketidakhadiran responden-responden. Pada 8 September 2016, Hakim Mahkamah Tinggi memerintahkan kedua-dua rayuan dibatalkan. Satu notis usul difailkan oleh PP untuk pengembalian semula rayuan-rayuan dan untuk penggantungan pelaksanaan keputusan Majistret. Pendakwa Raya memohon ke Mahkamah Tinggi untuk relif-relif berikut, antara lain (i) untuk penyenaraian semula rayuan-rayuan tersebut yang telah dibatalkan sebelum ini pada 8 September 2016; dan (ii) untuk membenarkan penangguhan masa kepada PR untuk memfailkan rayuan terhadap keputusan bertarikh 8 September 2016 ke Mahkamah Rayuan. Pada 19 Februari 2017, Mahkamah Tinggi menolak notis usul itu. Terkilan, PR merayu ke mahkamah ini. Pada permulaan perbicaraan, responden-responden membangkitkan bantahan awalan menyatakan bahawa rayuan ini tidak boleh dilayan atas alasan PR tidak mempunyai hak untuk merayu daripada perintah Mahkamah Tinggi.

Diputuskan (membenarkan rayuan)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Untuk memastikan sama ada keputusan muktamad, penting untuk mengambil kira bahawa bukan hanya hasil keputusan itu yang harus dipertimbangkan tetapi terutamanya kesannya. Perintah Mahkamah Tinggi menolak keputusan PR untuk penyenaraian semula rayuan-rayuan yang telah dibatalkan sebelum ini oleh hakim yang lain bukanlah keputusan interlokutori. Ini adalah pada peringkat rayuan selepas Majistret melepaskan dan membebaskan responden-responden. Sifat penolakan notis usul mempunyai elemen kemuktamadan. Dalam menolak notis usul itu, rayuan PR tidak akan mempunyai suara dan perintah pelepasan dan pembebasan yang dibuat Majistret, oleh itu, mesti dianggap muktamad. Oleh itu, keputusan bertarikh 19 Februari 2017 boleh dirayu ke Mahkamah Rayuan. Bantahan awalan responden-responden dengan itu ditolak.

(2) 'Penghakiman' harus bermaksud perintah atas merit dan bukan perintah penolakan kerana keingkaran. Oleh itu, *functus officio* bawah s. 278 Kanun Tatacara Jenayah tidak timbul kerana rayuan-rayuan dibatalkan hanya kerana alasan ketidakhadiran responden pertama tanpa mempertimbangkan keterangan keseluruhannya. Mahkamah Tinggi kompeten untuk mengetepikan perintah sedemikian dengan menggunakan bidang kuasa tersiratnya; dan dengan itu untuk menyenaraikan semula rayuan-rayuan dan untuk mendengar dan

memutuskan rayuan-rayuan menurut undang-undang. Oleh itu, rayuan-rayuan tersebut diremitkan semula ke Mahkamah Tinggi untuk didengar atas merit di hadapan Hakim Mahkamah Tinggi yang lain.

Case(s) referred to:
Ayubbhai Abdulbhai Shah v. Gabha Bechar & Ors: (1994) 1 GLR 441 ***(refd)***
Chhotey Lal v. Tinkey Lal AIR 1935 All 815 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Marzuki Mokhtar v. PP [1979] 1 LNS 141 ***(refd)***
Md Alwin Mustapa & Ors v. PP [1999] 5 CLJ 417 HC ***(refd)***
Ooi Sim Yim v. PP [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223 SC ***(dist)***
PP v. Arab Malaysia Finance Bhd [2003] 4 CLJ 243 HC ***(refd)***
PP v. Heng You Nang [1949] 1 LNS 61 HC ***(dist)***
PP lwn. Nasrun Effendi [2009] 3 CLJ 388 HC ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
Uthayakumar Ponnusamy v. YAB Dato' Sri Najib Tun Abdul Razak, Perdana Menteri Malaysia & Ors [2017] 6 CLJ 297 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 22, 50(2), 51(2), 56
Criminal Procedure Code, s. 278
Customs Act 1967, s. 135(1)(g), (iii)(aa), 138

Other source(s) referred to:
Hailsham Ed, *Halsbury's Laws of England,* Vol IX, paras 260-265

For the prosecution - Kwan Li Sa; DPP
For the respondents - JR Ravendren; M/s JR Ravendren & Assocs

[Editor's note: For the High Court judgment, please see PP v. Ng Wing Fau & Ors [2017] 1 LNS 423 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This appeal emanates from the decision of the High Court at Johor Bahru dated 19 February 2017, dismissing the Public Prosecutor's ("PP") criminal application filed *vide* a notice of motion dated 15 December 2016. In the said notice of motion, the PP applied to the High Court for the following reliefs:

(i) To relist the Appeals No. 41LB-03-02-2015 and No. 41(ORS)-01-02-2015 which were struck off earlier by His Lordship Justice Dato' Mohd Sofian bin Tan Sri Abd Razak on 8 September 2016;

A (ii) To grant an extension of time to the PP to file an appeal against the decision dated 8 September 2016 to the Court of Appeal; and

(iii) To stay the execution of the Magistrate's decision dated 28 January 2016 ordering the return of the seized goods to the respondent (fifth respondent).

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[2] Being disenchanted by the said order, the PP has now appealed to this court. Hence, this appeal before us.

Brief Background

C **[3]** In order to appreciate the short issue involved in this instant appeal, it is necessary to set out the following salient facts:

(i) The first and fifth respondents were charged separately before the Magistrate's Court at Johor Bahru for an offence under s. 135(1)(g) of the Customs Act 1967 and a second alternative charge under s. 138 of same Act, both punishable under s. 135(1)(iii) (aa) of the same Act. The first and fifth respondents claimed trial to the charges.

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(ii) Upon the application of the PP, a joint trial was held where the first respondent at all material times represented the fifth respondent's company.

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(iii) On 3 September 2013, the respondents were acquitted and discharged by the Magistrate's Court at the close of the prosecution's case without their defence being called on the ground that the prosecution had failed to make out a *prima facie* case against them.

F (iv) The PP appealed to the High Court. The High Court thereafter ordered the respondents to enter their defence and remitted the case back to the Magistrate's Court for continued hearing. On 28 January 2015, at the conclusion of the trial, the learned Magistrate held that the respondents had succeeded in raising a reasonable doubt in the prosecution's case. In the result, he acquitted and discharged the respondents.

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(v) The PP, being aggrieved by the decision of the learned Magistrate in acquitting and discharging the respondents had once again appealed to the High Court ie, Appeals No. 41LB-03-02-2015 and No. 41(ORS)-01-02-2015. The appeals were initially set for hearing on 18 April 2016 but were further postponed to 31 May 2016, 23 June 2016 and 8 September 2016 as the respondents were absent. The prosecution had made several unsuccessful attempts to trace the respondents. Due to their absence, the learned High Court Judge ordered both the appeals to be struck off.

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(vi) On 15 December 2016, the PP filed a notice of motion for reinstatement of the appeals accompanied with an affidavit in support. The PP had also sought for an extension of time to file an appeal against the High Court decision dated 8 September 2016 to the Court of Appeal and for a stay of execution of the decision of the learned Magistrate dated 28 January 2015 in ordering the seized exhibits to be returned to the first and fifth respondents. It is also noteworthy to mention that the said notice of motion had now included the second, third and fourth respondents although they were not charged before the Magistrate's Court.

(vii) On 19 February 2017, the learned High Court Judge had dismissed the notice of motion.

(viii) Being aggrieved with the said decision, the PP appealed to this court. Hence, this instant appeal before us.

The Issue Before The High Court

[4] There are four issues for determination by the High Court, namely:

(a) whether the appeals previously struck off by the High Court on 8 September 2016 can be relisted for hearing;

(b) whether the High Court can allow the extension of time to file an appeal to the Court of the Appeal against the decision of the High Court on 8 September 2016;

(c) whether the second, third and fourth respondents ought to be included in the application; and

(d) whether a stay of execution against the order of the Magistrate's Court to return the exhibits to the respondents should be allowed.

[5] In dismissing the PP's application, the learned High Court Judge reasoned, *inter alia*, as follows:

(a) A court of concurrent jurisdiction could not review an order made earlier by another court. The PP ought to have filed an appeal against the decision or order of Justice Dato' Mohd Sofian bin Tan Sri Abd Razak dated 8 September 2016 to the Court of Appeal;

(b) The High Court has no jurisdiction to allow any extension of time as sought by the PP because such application ought to have been made to the Court of Appeal pursuant to s. 56 of the Courts of Judicature Act 1964 ("CJA 1964");

(c) There was no special circumstance stated in the notice of motion warranting for a stay of execution in respect of the seized goods; and

(d) The inclusion of the second, third and fourth respondents was plainly misconceived.

A **Preliminary Objection**

[6] At the outset of the hearing of the appeal before us, learned counsel for the respondents raised a preliminary objection stating that the present appeal could not be entertained on the ground that the PP has no right of appeal from the order of the High Court dismissing the reinstatement B application. Learned counsel contended that when the motion was first considered by the High Court, it was not exercising its appellate or revisionary jurisdiction. The High Court too was not exercising its original jurisdiction under s. 22 of the CJA 1964. In the circumstance, learned counsel posited that there is no proper and competent appeal before the court C because the appeal has failed to fulfil the requirements of s. 51(2) of the CJA 1964. (See *Uthayakumar Ponnusamy v. Y.A.B Dato' Sri Najib Tun Abdul Razak, Perdana Menteri Malaysia & Ors* [2017] 6 CLJ 297; [2017] 1 MLJ 235).

[7] We have considered the aforesaid preliminary objection of learned counsel for the respondents. For reasons that follow, we disagree with the D submission.

[8] Section 50 of the CJA 1964 provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals are now to be confined only to decisions which would have the effect of finally disposing of the rights of the parties. Section 50 of the CJA 1964 reads as E follows:

> 50. Jurisdiction to hear and determine criminal appeals
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> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals the Court of Appeal shall have F jurisdiction to hear and determine any appeal against any decision made by the High Court:
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> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
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> (2) An appeal shall lie to the Court of Appeal with the leave of the Court of Appeal, *against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and* H *the determination of which by the High Court has affected the event of the appeal or revision.*
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> (2A) …
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> (3) …
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> I (4) … .
>
> (emphasis added)

[9] The word "decision" in s. 50(2) is defined in s. 3 of the CJA as follows: A

> decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[10] In *Saad Abas & Anor v. PP* [1998] 4 CLJ 575; [1999] 1 MLJ 129, the application of s. 50(2) of the CJA 1964 was explained at p. 587 (CLJ); p. 138 (MLJ) as follows: B

> So, for the purpose of s. 50(2), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence. C

[11] In *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537; [1999] 1 MLJ 321, the Court of Appeal when deliberating on the meaning of "decision" in s. 3 of the CJA 1964 and the criminal jurisdiction of the Court of Appeal under s. 50 of the same Act, held at p. 555 (CLJ); p. 335 (MLJ) that: D

> A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail was not appealable to the Court of Appeal. E F

[12] In our view, that in order to determine whether a decision is final, it is important to bear in mind that not merely the result of the decision be considered but also predominantly its effect. The order of the High Court dismissing the PP's application to relist Appeals No. 41LB-03-02-2015 and No. 41ORS-01-02-3015 which were struck out earlier by another judge was not an interlocutory decision. It must be noted that this was at the appellate stage after the learned Magistrate had acquitted and discharged the respondents. The very nature of the dismissal of the notice of motion possesses element of finality. Upon dismissing the notice of motion, the PP's appeal would become infructuous and the order of acquittal and discharge made by the learned Magistrate must therefore be regarded as final. Therefore, the decision dated 19 February 2017 is appealable to the Court of Appeal. G H I

[13] Another point to be noted is that an appeal by the PP pursuant to s. 50(2) of the CJA 1964 must confine the appeal to questions of law only. The notice of appeal dated 24 February 2017 has formulated the question of law in respect of which this instant appeal is made.

[14] For the above reasons, we would dismiss the preliminary objection and the PP's appeal before us is to be proceeded with.

Our Decision On Merits

Issue 1: Functus Officio

[15] In the case of *PP lwn. Nasrun Effendi* [2009] 3 CLJ 388, the principle of *functus officio* was explained at pp. 396-397 as follows:

> [15] Terdapat beberapa kes yang diputuskan oleh mahkamah-mahkamah di Malaysia berhubung dengan isu 'f*unctus officio*'. Bagi tujuan penghakiman ini, rujukan akan dibuat kepada kes *Tan Guek Tian & Anor v. Tan Kim Kiat (No 2)* [2007] 9 CLJ 215. Dalam kes tersebut, hakim Abdul Malik Ishak (sebagaimana beliau ketika itu) telah membincangkan secara panjang lebar isu '*functus officio*' dengan membuat rujukan kepada beberapa kes yang diputuskan oleh Mahkamah Australia dan Amerika Syarikat. Di ms 223 beliau berkata seperti yang berikut:
>
> > I will now refer to the case of *Leung and Another v. Minister For Immigration And Multicultural Affairs* [1997] 150 ALR 76, a decision of the Federal Court of Australia with a coram of Beaumont, Heerey and Finkelstein JJ. There, Finkelstein J, had this to say (see p. 84 of the report):
> >
> > The origin of the principle of '*functus officio*' as that expression is currently employed is to be found in the latter part of the last century in England when it was decided that a final decision of a court could not be reopened. The reason given was that the power to reopen a dispute had been transferred to the court of appeal: *Re St Nazaire Co* [1879] 12 Ch D 88. The rule applied only after the formal judgment of court had been passed and entered and was subject to two exceptions, *viz* where there had been a slip in drawing it up and where there had been an error in expressing the intention of the court: *Re Swire* [1885] 30 Ch D 239; *Preston Banking Co v. William Allsup & Sons* [1895] 1 Ch 141; *Ainsworth v. Wilding* [1896] 1 Ch 673.
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> [16] Dalam satu keputusan kes Mahkamah Agung Kanada, *Chandler v. Alberta Associations of Architects* [1989] 2 SCR 848, Hakim Sopinka berkata mengenai '*functus officio*' seperti yang berikut:
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> (1) *'Functus Officio'*
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> > *Jowitt's Dictionary of English Law* (2nd ed. 1977) defines *functus officio* as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order

or award so that his authority is exhausted. The holding of Morton J in *Re V.G.M. Holdings, Ltd.* [1941] 3 All ER 417 (Ch. D), is well summarised in the headnote:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

An editorial note added that:

> This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is '*functus officio*', and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.
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> *Black's Law Dictionary* (5th ed. 1979) defines *'functus officio'* as "a task performed":
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> Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.
>
> The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd. And Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* [1964] 44 DIR. (2d) 463 (BCSC)) "To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine" (appellants' *factum*, at p. 19).

Seterusnya pada para 20 (SCJ) hakim berkata:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can do so only if authorised by statute or if there has been a slip or error within the exception enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.* [1934] SCR 186.

[16] In holding that he had no implied power to alter the previous High Court order dated 8 September 2016, the learned High Court Judge stated as follows:

A [12] Can this court now revisit the decision made by a court of co-ordinate jurisdiction on 8.9.2016? A rather similar matter arose in the case of *PP v. Chong Kok Choy* [1995] MLJU 549, which concerned the issue of whether a court of concurrent jurisdiction can rectify or vary its order made earlier. The High Court there held as follows:

B In *PP v. Heng You Nang* (1949) 15 MLJ 285, Spenser Wilkinson, J citing the following passage from the judgment of Petheram CJ in the Indian case of *In re Gibbons* (a decision made at the time when the Indian section 369 was very similar to our section 278) held once a judgment in a criminal matter has been pronounced and signed it cannot be altered. The passage in the Indian case is as

C follows:

> 10. In my opinion the effect of the words 'other than a High Court' is precisely the same as if in place of them the Legislature had at the end of the section added these words `this section does not apply to the High Court`. There is no substantive enactment in that section with

D reference to the High Court, and all it does is to reserve the powers which existed in the High Court before, so that they are in no degree taken away. What the powers of the High Court were before it is unnecessary to consider, but whatever they were, they were reserved and they were in

E the same position after this section was passed as they had been in before; and inasmuch as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power, and therefore, it appears that this section does not help the applicant.

F The above passage and the opinion of Spenser-Wilkon, J in *Public Prosecutor v. Heng You Nang supra*, were cited with approval by the then Supreme Court in *Ooi Sim v. PP* (1990) 1 MLJ 88 where it held that section 278 does not empower the High Court to substitute its judgment after it was recorded and delivered.

G [13] The above passage makes it clear that once a High Court has pronounced a judgment it cannot substitute its own judgment. Although the passage concerned the effect of section 278 of the Criminal Procedure Code, the principle is of general application. The phrase "judgment" would also necessarily include any order made by a High Court.

H **[17]** Learned DPP submitted that when the appeals were struck off, the actual issues of the appeal proper were not yet decided upon. Therefore, she spiritedly and vehemently argued that the High Court was not *functus officio* as the order dated 8 September 2016 is not a "judgment". The question then arises – what is a "judgment" in a criminal case? And, can an order striking

I off an appeal comes within the purview of that term?

[18] The word "judgment" is not defined in the Criminal Procedure Code. The *Halsbury's Laws of England*, Hailsham Ed, Vol IX, paras 260-265 explains it as a final order in a trial terminating in the conviction or acquittal of the accused. In *Chhotey Lal v. Tinkey Lal* AIR 1935 All 815, the court regarded that an order in the nature of a judgment is one which is passed on full enquiry and after hearing both parties. In *Ayubbhai Abdulbhai Shah v. Gabha Bechar & Ors*: (1994) 1 GLR 441, the Gujara High Court, has held as under:

> The aforesaid discussion from the Supreme Court decision read along with the reference to *Halsbury's Laws of England* makes it quite clear that the order dismissing the matter for default is not a decision on merits. The judgment is nothing if not a decision given by a competent Court on merits of a case in respect of a *lis* between the parties.

(See also *Marzuki Mokhtar v. PP* [1979] 1 LNS 141; [1981] 2 MLJ 155, *Md Alwin Mustapa & Ors v. PP* [1999] 5 CLJ 417, *PP v. Arab Malaysia Finance Bhd* [2003] 4 CLJ 243.)

[19] Thus, by using the proper approach of analogy from the decided cases from other jurisdictions, the expression "judgment" must necessarily mean a considered order on merits and not an order of dismissal for default. Therefore, *functus officio* under s. 278 of the Criminal Procedure Code does not arise as the appeals were struck off merely by reason of the non-appearance of the first respondent without consideration of the entire evidence. The High Court is competent to set aside such order by invoking its inherent jurisdiction; and thereafter to relist the appeals and to hear and decide the appeals according to law.

[20] With respect, the cases cited by the learned High Court Judge are of no assistance as the instant appeal is clearly distinguishable from the former. In *PP v. Heng You Nang* [1949] 1 LNS 61, the PP had appealed against the acquittal of the respondent on charges connected with the alleged importation of certain goods by the respondent. The appeal was dismissed. Subsequently, the DPP applied by motion that the court should hear further arguments and review its judgment. In *Ooi Sim Yim v. PP* [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223, the appellant had pleaded guilty to two charges, for possession of a firearm and ammunition. The trial judge sentenced the appellant to ten years' imprisonment and six strokes of whipping on the first charge and another three years on the second charge and ordered that 'both terms of imprisonment are to run consecutively from and be backdated to the date of his arrest. About two and a half months after the disposal of the case, the trial judge issued a corrigenda to substitute the original order with a new one which had the effect of making both sentences to run consecutively, ie, the appellant was to serve a total of 13 years imprisonment to take effect from the date of his arrest. The approach taken by Petheram CJ in *Re Gibbons* and

A Spenser-Wilkinson J in *Heng You Nang* and Mohamed Azmi SCJ in *Ooi Sim Yim* was based on the rational that the cases were already heard on merits after taking into consideration the entire material on record. This differs from our present scenario as the order dated 8 September 2016 could not be regarded as a "judgment" or final order.

B

Conclusion

[21] For the foregoing reasons, we allowed the PP's appeal and set aside the order dated 19 February 2017 and relist the Appeals No. 41LB-03-02-2015 and No. 41(ORS)-01-02-2015. The appeals are to be remitted back to the High Court and be heard on its merits before another High Court Judge. Pending disposal of the appeal, a stay of execution against the order of the Magistrate's Court to return the exhibits to the respondent is also granted pending the disposal of the appeals. So ordered.

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